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Louisiana Practice - Deficiency Judgment Act - Applicability to Surety on Mortgage Note

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LOUISIANA PRACTICE—DEFICIENCY JUDGMENT ACT—APPLICABILITY TO SURETY ON MORTGAGE NOTE

Defendant sureties were sued for a deficiency remaining after mortgaged property had been judicially sold without appraisement. The district court sustained exceptions of no right and no cause of action, based upon the provisions of the Deficiency Judgment Act.[1] *Held*, a creditor who enforces a mortgage by having the mortgaged property sold without appraisement loses his right to recover the deficiency from the debtor or his surety. *Simmons v. Clark*, 64 So. 2d 520 (La. App. 1953).

The Louisiana Code of Practice requires an appraisal of property prior to judicial sale.[2] If at the sale the highest bid does not equal or exceed two-thirds of its appraised value, there can be no valid adjudication of the property.[3] The ability of the mortgagee to bid the property up to the amount of the mortgage indebtedness, without requiring any cash outlay except for the relatively small sum due for costs, serves effectively to discourage competitive bidding by third parties. However, at least in theory, the requirement that the property be sold for not less than two-thirds of its appraised value affords a considerable measure of protection to the mortgagor. Normally, under this requirement the proceeds realized from the judicial sale reduce the mortgage indebtedness to less than a third, and accordingly limits any subsequent deficiency judgment obtained against the mortgagor. In normal times, these theoretical safeguards work reasonably well. In periods of financial stress, when property values are depressed appreciably, the requirement that the

1. La. R.S. 1950, 13:4106 through 13:4108. The provisions pertinent here are contained in La. R.S. 1950, 13:4106, as amended by La. Act 20 of 1952, and read as follows: "In any case where any mortgagee or other creditor takes advantage of the waiver of appraisement of the debtor and provokes a judicial sale, without the benefit of appraisement, of the encumbered property, whether real or personal, or of both characters, and the proceeds of such sale are insufficient to satisfy the debt for which the property is sold, the debt nevertheless shall stand fully satisfied and discharged, insofar as said debt constitutes a personal obligation against the debtor or debtors, and such mortgagee or other creditor shall not thereafter have the right to proceed against the debtor or any other of his property for such deficiency, in any manner whatsoever . . . ."

2. Art. 671, La. Code of Practice of 1870, as amended by La. Act 74 of 1946. The amendment makes no change in the provisions of this article except as to the manner of selecting appraisers.

3. Art. 680, La. Code of Practice of 1870.

property bring two-thirds of its appraised value offers less effective protection to the mortgagor.

In normal times, the combination of the waiver of appraisement and discouragement of competitive bidding often proves disastrous to the mortgagor.[4] In the depression of 1929-1933, this result became universal. To remedy this unfortunate situation the Louisiana Legislature in 1934 adopted the Deficiency Judgment Act,[5] which forces the mortgagee who provokes the judicial sale of mortgaged property without appraisement to forego his claim for any deficiency. To insure its effectiveness, the statute provided that its provisions were declaratory of public policy, and prohibited any waiver thereof.[6]

The Deficiency Judgment Act refers specifically only to a *judicial sale* without appraisement. However, in *Home Finance Service v. Walmsley*[7] the court of appeal utilized the statute's declaration of public policy to extend analogically[8] the application of the statute to private sales without appraisement. This procedure has subsequently been affirmed in *Southland Investment Co. v. Lofton*[9] and *Futch v. Gregory*.[10] The force of the *Walmsley* case, however, has been weakened to some extent by dictum in the *Lofton* case, where the court indicated that very possibly the protection afforded by the Deficiency Judgment Act might be waived by the mortgagor who voluntarily turned the property over to the mortgagee for private sale without appraise-

4. For an illustration of this unfortunate possibility, see Milburn v. Proctor Trust Co., 32 F. Supp. 635 (D.C. La. 1940), affirmed 122 F. 2d 569 (5th Cir. 1941), certiorari denied 314 U.S. 698 (1942).

5. La. Act 28 of 1934, now La. R.S. 1950, 13:4106 through 13:4108.

6. "R.S. 13:4106 declares that a public policy and the provisions thereof cannot, and shall not be waived by a debtor, but it shall only apply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934." La. R.S. 1950, 13:4107.

7. 176 So. 415 (La. App. 1937).

8. The analogical application of a code or statutory provision is a traditional judicial technique of civilian jurisdictions. Edward Livingston clearly contemplated that it would be applied by the Louisiana courts. "If the case be a new one, [the judge] must decide without positive law; he must frame his judgment by analogical reason from the law in similar cases . . . ." 1 Livingston, Works on Criminal Jurisprudence 171 (1873). Professor Franklin has voiced the opinion that Article 21 of the Louisiana Civil Code represents a consecration of the analogy technique of the civil law. Franklin, Equity in Louisiana: The Role of Article 21, 9 Tulane L. Rev. 485, 501 (1935). For an excellent discussion of the subject, see Morrow, Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation, 17 Tulane L. Rev. 351, 390-391 (1943).

9. 194 So. 125 (La. App. 1940).

10. 40 So. 2d 830 (La. App. 1949). See, in accord: Liberal Finance Corp. v. Washington, 62 So. 2d 545 (La. App. 1953); Farmer v. Smith, 59 So. 2d 778 (La. App. 1952).

ment after a delinquency in the payment of the mortgage.[11] This position appears most unfortunate, for even a modified application of this principle would serve as an exception to the statutory prohibition against waiver. In *Futch v. Gregory* there is dictum which indicates that the Deficiency Judgment Act would not be violated by a surrender to the mortgagee of the mortgaged movable in partial payment of the debt.[11a] Consider a situation in which there is such a surrender under an agreement requiring the amount of debt reduction to be dependent on a subsequent sale of the movable without appraisement. This presents a stronger situation than that exemplified by the *Lofton* dictum, but it would still amount to an exception to the statutory prohibition against waiver. The *Futch* dictum would apparently reject this type agreement, because its reasoning is predicated on the unconditional passage of title, which obviates the necessity of the mortgagee accounting to the mortgagor for a subsequent sale of the movable. Clearly, if the debt reduction was made dependent on the sale, accountability would be necessary.

Southland Investment Co. v. Motor Sales Co.[12] presented the only occasion, prior to the *Simmons* case, where a Louisiana court had to determine the applicability of the Deficiency Judgment Act to parties secondarily liable on the mortgage indebtedness. There, in the only case in which the Supreme Court had occasion to apply the statute, an endorser was held liable for a deficiency remaining after private sales without appraisement of mortgaged automobiles. However, this case may be distinguished from the *Simmons* case on the facts.[13] Neither the opinion in the *Motor Sales Co.* case, nor the transcript of appeal, is

11. "If there had been no collateral agreement, which clearly evidences the intent to defeat the underlying purposes . . . of the Act, . . . defendant had decided it was to his advantage to turn over his car to his mortgagee for it to sell at private sale and apply the proceeds to the balance due, a different situation would confront us." 194 So. 125, 127.

11a. "Of course, this act was not designed to affect the freedom of a mortgagor and a mortgagee with respect to the surrender of the mortgaged chattel to the latter in satisfaction, in whole or part, of the mortgage indebtedness, as they shall in good faith agree. In that case the title to the property would pass unconditionally to the mortgagee who would be free to sell the chattel for such price as he desired without the duty of accounting to the mortgagor therefor." Futch v. Gregory, 40 So. 2d 830, 831 (La. App. 1949).

12. 198 La. 1028, 5 So. 2d 324 (1941).

13. In the *Motor Sales Co.* case the defendant automobile dealer agreed with plaintiff investment company to sell certain promissory notes secured by chattel mortgages on the automobiles sold by plaintiff. The agreement further provided that defendant would endorse these notes, but its liability as endorser was not to arise until plaintiff had repossessed the automobiles and turned them over to defendant.

as clear on the point as might be desired, but apparently the mortgaged property was sold either by the secondary debtor, or jointly by the latter and the mortgagee. Under either alternative, the facts not only permit a differentiation of the *Simmons* case, but actually remove the case from the purview of the Deficiency Judgment Act. The sole purpose sought to be accomplished by the statute was to afford protection to a debtor who could not otherwise protect himself. If, as in the *Motor Sales Co.* case, the debtor, and not the creditor, sells the property, the protection of the statute is not needed, as the debtor can protect himself by refusing to sell except for an adequate price.

In the instant case, plaintiff admitted that the Deficiency Judgment Act precluded recovery of any deficiency against the mortgagor, but contended that the statute afforded no protection to the surety. The court refused to accept this argument. Article 3060 of the Civil Code allows the surety to assert any defense available to the principal debtor, except those which are purely personal to him. The jurisprudence has interpreted personal defenses as limited to defenses such as bankruptcy,[14] coverture,[15] corporate immunity from tort liability while performing a governmental function,[16] and the like. Clearly, the defense asserted by defendant in the *Simmons* case was of an entirely different nature. But if otherwise, the doctrine of Article 3061 of the Civil Code would have been sufficient to preclude recovery. Under this article, a surety is discharged when the creditor's act prevents the surety from being subrogated to the creditor's rights, mortgages and privileges. The Deficiency Judgment Act in no way excepts a secondary debtor from the scope of its application. Any such exception would permit a creditor to do indirectly what he is expressly prohibited from doing directly.

A sound public policy is served by the Deficiency Judgment Act. Its purpose is to afford protection to the mortgagor who otherwise would be forced to waive conventionally the benefit of the appraisement requirements. This objective can be attained effectively only by interpreting the statute broadly enough to nullify attempts to circumvent its provisions. The *Simmons* case is an additional step in the direction of attaining the full

14. Serra E Hijo v. Hoffman and Co., 30 La. Ann. 67 (1878).
15. Kennedy v. Bossiere, 16 La. Ann. 445 (1862).
16. Rome v. London and Lancashire Indemnity Co. of America, 181 La. 630, 160 So. 121 (1935).

objective of the statute, as it eliminates any doubt which the *Motor Sales Co.* case may have created concerning the act's application to secondary debtors. The sole remaining doubt is provided by the unfortunate dictum in the *Lofton* case. It is to be hoped that the Louisiana courts will seize upon the first opportunity to repudiate this dictum, and to reaffirm the rationale of the *Walmsley* and *Simmons* cases.

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LOUISIANA PRACTICE—EXECUTORY PROCESS—USE OF INJUNCTION TO RAISE QUESTION OF AUTHENTICITY

Plaintiff invoked the seizure of defendant's automobile under executory process[1] to enforce a chattel mortgage given to secure the unpaid portion of the purchase price. This mortgage was evidenced by an act under private signature duly acknowledged and was identified with a promissory note executed in connection therewith. Defendant sought injunction to oppose plaintiff's use of executory process, upon the ground that the mortgage was not in authentic form. The trial court held that defendant's remedy was by appeal from the order of seizure and sale. *Held*, the issue of lack of authentic evidence may be raised by a defendant in executory proceedings by resort to injunctive process. *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So. 2d 417 (1953).

Though generally service of citation cannot be waived, nor judgment confessed, Louisiana's Constitution makes a specific exception in the case of executory process.[2] Historically, the procedure recognized by this constitutional provision was developed originally by the medieval Italian jurists out of the

1. For the information of the common law lawyer, it may be pointed out that a proceeding is executory when seizure of the debtor's property is obtained without previous citation, by virtue of an act or title importing confession of judgment. Art. 98, La. Code of Practice of 1870, provides for executory process in other cases also. This idea is foreign to the common law, for a confession of judgment prior to maturity of an obligation is an absolute nullity under that system. See Tidd, Practice 599 et seq. (9 ed. 1840). It may be further pointed out that the common law *cognovit actionem* is roughly analogous to the procedure used in the principal case. In the *cognovit actionem* situation confession of judgment does not take place until after maturity of the obligation; whereas confession of judgment warranting executory process is confected prior to maturity. It is the idea of confession of judgment prior to maturity which the common law rejects.

2. La. Const. of 1921, Art. VII, § 44.